



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Deepwater Contracting Co., Inc.
File: B-228382
Date: December 15, 1987

DIGEST

Where solicitation for collection, removal and disposal of harbor debris included alternate schedules, one for disposal in a landfill or by recycling and the other for disposal by ocean burning, and which provided that if the low bid was for ocean disposal, Environmental Protection Agency (EPA) approval for selection of the ocean-disposal bid would be required, award to low bidder for land-based disposal was proper despite the fact that protester's price for ocean-disposal was lower since EPA refused to approve selection of the ocean-disposal bid.

DECISION

Deepwater Contracting Co., Inc. protests the award of a contract to Cross-Bay Contracting Corp. under invitation for bids (IFB) No. DACW51-87-B-0021, issued by the United States Army Corps of Engineers for the collection, removal, and disposal of derelict vessels, shore structures and other debris in the Bayonne Reach section of the New York Harbor. Deepwater argues that as the low bidder, it is entitled to award. We deny the protest.

The IFB contained two price schedules, each consisting of one base item and three optional items, with award to be made to the low bidder for the base and first optional items. Price schedule No. 1 provided for the disposal of the debris in a landfill or by recycling; price schedule No. 2 provided for disposal by burning at sea. Bidders were instructed that:

"The low bidder for purposes of award shall be the conforming responsible bidder offering the lower amount for either schedule, provided a valid EPA Ocean Burning Permit for the duration of the contract is part of these specifications.

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Should the lower amount be for Schedule 2, all requirements of the burning permit (Section J) will have to be fulfilled prior to any award. In the absence of a valid ocean burning permit award will be based on Schedule 1 only. Only one schedule will be awarded under this solicitation." (Emphasis supplied.)

The ocean burning permit set forth in section J, issued to the Corps, New York district for waste generated at the New York Harbor and environs, included the following special condition 2.a.(2):

"Thirty days prior to the proposed initiation of any new wood-burning project (those projects not initiated under a previous permit) the permittee shall submit to EPA for approval the following:

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"ii. A summary of bids received in response to bid invitations for wood-burning projects. If any of the bids are received for a form of disposal other than ocean burning and if a contract for ocean burning is planned to be awarded, the permittee shall submit for EPA's approval, (in advance of the awarding of a contract), an explanation of why a land-based alternative disposal method is not being selected. This explanation shall include an evaluation of each bid as to whether it is technically feasible, environmentally acceptable, and economically reasonable."

Four bids were opened on September 9, 1987. Cross-Bay submitted the only bid for schedule No. 1 at \$1,126,400; Deepwater's bid of \$877,399 was low for schedule No. 2. By letter dated September 10, the Corps notified the Environmental Protection Agency (EPA) that it intended to award a contract for ocean burning to Deepwater. The Corps justified its selection of the bid for ocean burning on the grounds that disposal of the debris in a landfill would generate noise and air pollution due to the heavy equipment needed to perform the work; locating a suitable landfill would be difficult; recycling of the material was unlikely because the timber contained a large amount of metal (e.g. nails) and would be splintered during removal; and the only bid for land-based disposal was less economical than the low bid for ocean burning.

EPA refused to approve the Corps' selection of a bid for ocean burning, concluding that the submission of a bid for land-based disposal indicated that such an alternative was

technically feasible and that the difference between the ocean burning bid and the land-based alternative was small enough to indicate that land-based disposal was economically feasible. EPA further noted that its regulations permitted ocean disposal only where there were no land-based alternatives with less adverse environmental impact, and that it had been unable to conclude based on the information submitted by the Corps that such was the case here. EPA advised the Corps that if it wished to provide additional information regarding the environmental impact of land-based disposal, its request would be reevaluated. The Corps did not submit additional information; instead, on September 25, it awarded a contract to Cross-Bay.

Deepwater argues that since its bid on schedule No. 2 was lower than Cross-Bay's bid on schedule No. 1 and the solicitation indicated that there was a valid ocean burning permit for the project, it should have been awarded the contract.

As previously noted, the IFB provided that in the event that the low bid was based on ocean burning, all requirements of the burning permit would have to be fulfilled prior to award; the burning permit in turn required that EPA approve the selection of a bid for ocean burning where a bid for land-based disposal was also received. The Corps sought EPA's approval for Deepwater's bid for ocean burning, but EPA rejected its request. Since all requirements of the burning permit were thus not satisfied, the Corps had no alternative but to award to a bidder offering land-based disposal.


Deepwater contends that if the Corps was unable to obtain EPA approval for ocean burning for this project, it should have notified bidders of that fact prior to bid opening. The IFB, which included a copy of the permit, clearly placed bidders on notice that EPA approval, where required, would be sought after bid opening. Thus, to the extent that the protester is now objecting to this term of the solicitation, its protest is untimely since a protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987).

The protester also argues that the Corps had a duty to seek reevaluation of its request for approval of an ocean-disposal bid, given that EPA had indicated that it would reevaluate the request if the Corps provided additional information concerning the adverse environmental consequences of land-based disposal.

The contracting officer explains that the Corps did not ask EPA to reevaluate the request because it did not feel that it could strengthen its position through the submission of additional information. The contracting officer contends that it was clear from the Corps' original submission to the EPA that if award were made for land-based disposal, most of the wood would be disposed of in a landfill. The contracting officer adds that the Corps does not believe that there are environmental hazards associated with this method of disposal which it failed to mention.

We do not think that the Corps' position is unreasonable. The Corps had already summarized what it perceived to be the negative environmental consequences of landfill disposal (i.e. noise and air pollution generated by the heavy machinery required to perform the work). While the Corps could have contacted Cross-Bay and requested more specific information on its plans for disposal, the agency apparently concluded that it would not be able to obtain further evidence of adverse impact. The fact that EPA had indicated a willingness to reconsider its decision in light of additional information did not obligate the Corps to seek such reconsideration if it did not feel that it could bolster its case.

The protest is denied.


James F. Hinchman
General Counsel